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No. 10-590

In the Supreme Court of the United States

CLACY WATSON HERRERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals violated petitioner's Sixth Amendment rights when, after granting mandamus to correct a ruling "so patently unsound as to exceed the legitimate bounds of judicial power," Pet. App. 5a, it *sua sponte* reassigned the case to a new district judge.

2. Whether the court of appeals' grant of mandamus was such an extraordinary departure from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power.

3. Whether the court of appeals abused the writ of mandamus when it reversed an evidentiary ruling that was a clear and indisputable abuse of discretion, where there was no other adequate remedy for the government.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-13a) is reported at 614 F.3d 661.

JURISDICTION

The judgment of the court of appeals was entered on July 30, 2010. A petition for rehearing was denied on August 20, 2010 (Pet. App. 24a). The petition for a writ of certiorari was filed on October 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

During petitioner's jury trial in the United States District Court for the Northern District of Illinois, the court of appeals issued a writ of mandamus directing the district court to admit into evidence a government exhibit, allow the government to recall a witness, and allow

testimony from other government witnesses. The court of appeals also ordered that the case be reassigned to a different district judge. Pet. App. 2a-13a, 22a. Petitioner was subsequently convicted of conspiring to import and export more than five kilograms of cocaine, in violation of 21 U.S.C. 952, 953, and 963; two counts of importing more than 500 grams of cocaine, in violation of 21 U.S.C. 952 and 18 U.S.C. 2; attempting to import cocaine, in violation of 21 U.S.C. 963 and 18 U.S.C. 2; and four counts of importing more than 100 grams of heroin, in violation of 21 U.S.C. 952 and 18 U.S.C. 2. Petitioner has not yet been sentenced.

1. Petitioner, operating in Panama, was the leader and primary supplier of a three-year international drug trafficking conspiracy involving over 40 individuals. From 1996 to 1999, the conspirators imported large amounts of cocaine and heroin into the United States from Jamaica and Panama. The conspirators recruited female couriers in the United States, primarily in Chicago, to travel to Panama to receive drugs from petitioner. The couriers used various methods to smuggle the drugs into the United States, including putting the drugs in plastic wrap packaging which they swallowed or inserted into their body cavities. Pet. App. 15a; 10-2766 Gov't C.A. Mandamus Pet. 3.

2. On December 13, 2001, a grand jury in the Northern District of Illinois charged petitioner and 25 codefendants in a 44-count indictment alleging various drug trafficking offenses. By 2005, the majority of defendants had been convicted. Petitioner remained a fugitive until June 2009, when he was extradited from Panama. Petitioner's trial was scheduled to begin in November 2009. See Pet. App. 15a.

3. In early September 2009, federal agents began culling the evidence obtained in the earlier investigation of the conspiracy for evidence that was connected to petitioner. The government informed petitioner that it was submitting the evidence, including drugs and drug packaging, for fingerprint analysis. On September 21, the deadline for disclosure of expert testimony, the government notified petitioner that it had not yet received any results from the fingerprint testing. On November 2, a week before the trial was scheduled to begin, the government learned that two fingerprints matching petitioner's had been found on a piece of brown tape used to wrap a package of drugs that was recovered from the body cavity of a drug courier. The government disclosed the results to petitioner. On November 3, petitioner moved to exclude the fingerprint evidence on the ground that it was not timely disclosed. The court granted the motion. See Pet. App. 16a; 10-2678 Gov't C.A. Mandamus Pet. 3.

The government took an interlocutory appeal pursuant to 18 U.S.C. 3731, and the court of appeals reversed. The court held that the district court did not abuse its discretion in finding that the government's disclosure was tardy, but that "[t]he punishment simply does not fit the crime." Pet. App. 14a, 17a. The court emphasized that the record did not disclose either "bad faith or reckless foot-dragging by the government" and that the evidence had "immense probative value" given the complexity of the case and the amount of time that had passed while petitioner was a fugitive. *Id.* at 17a-18a. The court therefore concluded that "[e]xclusion of the government's fingerprint evidence was too drastic a remedy," especially because the trial could have been delayed by "a few weeks to give the defense a greater

opportunity to study and confront the evidence." *Id.* at 18a.

4. On July 6, 2010, petitioner's trial began. 10-2678 Gov't C.A. Mandamus Pet. 3. During its case-in-chief, the government sought to introduce "Government Exhibit Roberson Seizure 2" (Roberson Seizure 2), which contained the drugs and their packaging, including the brown tape from which petitioner's fingerprints were recovered. In order to establish the chain of custody for the exhibit, the government presented ten witnesses, who established nearly every link in the chain of custody. 10-2766 Gov't C.A. Mandamus Pet. 8-10. Although one of the forensic chemists who had examined the evidence had since died, the government offered testimony from the chemist's supervisor about the laboratory's routine evidence-handling practices and the chemist's reliability. *Id.* at 9 & n.3. The government's last witness, forensic chemist Stephen Koop, testified about his receipt of the bag containing the evidence and his handling and examination of the bag's contents. He also identified Roberson Seizure 2 as containing the tape that he examined for fingerprints. *Id.* at 10. No evidence indicated that the exhibit had been mishandled in any way.

Following Koop's testimony, the government moved to admit Roberson Seizure 2. Petitioner objected. During the colloquy relating to the evidence's admissibility, the district court raised a succession of theories about possible tampering with the exhibit, speculating that multiple government scientists had manipulated or mishandled the evidence. 10-2678 Gov't C.A. Mandamus Pet. 12-17. The court sustained petitioner's objection to admission of the evidence and also ruled that the government could not recall Koop or present proffered tes-

timony from two forensic scientists who had recovered and verified petitioner's fingerprints. *Id.* at 17-18.

5. The government filed a petition for a writ of mandamus. The district judge requested an opportunity to respond to the mandamus petition, in which he stated that he had "made no definitive ruling on the record admitting or excluding [the] evidence at issue." Pet. App. 20a (brackets in original).

The court of appeals denied the government's petition without prejudice to renewal after the district court had ruled definitively. Pet. App. 20a. In its order, the court of appeals observed that the district court's exclusion of the evidence appeared to be premised on chain-of-custody grounds. Citing Seventh Circuit precedent, the court of appeals emphasized that government officials' actions in maintaining custody of evidence are entitled to a "presumption of regularity"; the government is not required to prove a perfect chain of custody; and any gaps in the chain go to the weight of the evidence, not its admissibility. *Ibid.* (citing *United States* v. *Lee*, 502 F.3d 691, 697 (7th Cir. 2007), cert. denied, 552 U.S. 1219 (2008); *United States* v. *Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994)).

6. Three days after trial resumed, the district court definitively sustained petitioner's objection to the admission of Roberson Seizure 2 based on what it termed "outrageous conduct," namely, Immigration and Customs Enforcement's routine policy of re-bagging and re-weighing narcotics exhibits each time they are checked in and out of evidence. 10-2766 Gov't C.A. Mandamus Pet. 11; 7/21/10 Tr. 1591-1608. The court speculated that petitioner's fingerprints could have been "introduced" by government officials when the drugs were re-bagged in May or September 2001, a theory that the

district court based on the exhibit's gain of 20 grams in weight during that period. See Pet. App. 9a; 10-2766 Gov't C.A. Mandamus Pet. 11; 7/21/10 Tr. 1592. The government explained that when agents re-bag and re-weigh an exhibit they may include other bags which add to the weight, and it observed that petitioner's fingerprints could not have been obtained and transferred to the adhesive side of the tape while petitioner was in Panama, before his extradition to the United States. The court rejected this explanation, accusing the attorneys for the government of intentionally misleading the court. 10-2766 Gov't C.A. Mandamus Pet. 14; see, *e.g.*, 7/21/10 Tr. 1765 ("I don't believe you when you say just about anything anymore because I know that you will lie to a court any time it helps you. I know that. I saw you do it. I know you will do that."). The court also accused government attorneys of other misconduct, including intentionally seeking a mistrial (even though double jeopardy would have barred a retrial if the government had intentionally procured a mistrial, see *Oregon* v. *Kennedy*, 456 U.S. 667, 673-676 (1982)). 10-2766 Gov't C.A. Mandamus Pet. 13-15; see Pet. App. 4a, 9a-11a.

7. In light of the district court's "definitive" ruling excluding the evidence, the government renewed its petition for a writ of mandamus in the court of appeals. On July 27, 2010, the court of appeals granted the writ, ordering the district court to admit Roberson Seizure 2, allow the government to recall Koop to testify about the recovery of latent fingerprints from that exhibit, and allow the government to present the testimony of forensic scientists about the fingerprint comparison. In addi-

tion, the court ordered, under Seventh Circuit Rule 36,[1] that the case be reassigned to a district judge who was immediately available to preside over the remainder of the trial. The court stated that an explanatory opinion would follow. Pet. App. 22a.

On July 30, 2010, the court of appeals issued an opinion that explained the court's grant of mandamus and also denied petitioner's motion for panel rehearing. Pet. App. 3a. The court stated the district court had excluded Roberson Seizure 2 and the related testimony on "patently unsound" grounds, *id.* at 5a, and that the court of appeals had been forced to grant mandamus in "unavoidable haste," before explaining its reasoning, because the district court had threatened to declare a mistrial, which would have had double-jeopardy effect on the entire case, *id.* at 4a-5a. The court explained that the district court's exclusion of the "especially important" evidence, *id.* at 7a, based on "implausible speculation" that the government had tampered with it, was "so patently unsound as to exceed the legitimate bounds of judicial power," *id.* at 5a, 11a. Recounting the district judge's accusations of government misconduct and his invitation to the jurors to declare themselves unable to continue to serve, *id.* at 4a, the court observed that the district judge had displayed "a degree of anger and hostility toward the government that [was] in excess of any provocation that we can find in the record," *id.* at 9a.

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[1] Seventh Circuit Rule 36 provides that "[w]henever a case tried in a district court is remanded by this court for a new trial, it shall be reassigned by the district court for trial before a judge other than the judge who heard the prior trial unless the remand order directs or all parties request that the same judge retry the case. In appeals which are not subject to this rule by its terms, this court may nevertheless direct in its opinion or order that this rule shall apply on remand."

Given the clarity of the district court's legal error in excluding the evidence and the "manifest" "excess of emotion" displayed by the judge, the court concluded that mandamus was warranted. *Id.* at 11a (citing *United States* v. *Prieto*, 549 F.3d 513, 524-525 (7th Cir. 2008), which held that chain-of-custody issues go to the weight of the evidence).

The court also addressed petitioner's argument that the court had improperly granted the writ of mandamus before petitioner and the district judge had a chance to respond to the government's petition. The court explained that because petitioner had subsequently filed a petition for panel rehearing and rehearing en banc, the court had considered the arguments contained in that petition, as well as in the district judge's request to file a response, before issuing its explanatory opinion. Pet. App. 6a. The court then addressed and rejected petitioner's argument that relief was not warranted because 18 U.S.C. 3731, which governs interlocutory appeals by the government, does not authorize an appeal of an evidentiary ruling after trial has begun. Pet. App. 6a-7a.

Regarding its direction that the case be reassigned, the court explained that Federal Rule of Criminal Procedure 25(a) provides that when "death, sickness, or other disability" prevents the trial judge from continuing to preside over a trial, a new judge may take over the supervision of the trial upon certifying her familiarity with the trial record. Pet. App. 3a. A judge's recusal, the court of appeals stated, falls within Rule 25(a)'s provision for "other disabilit[ies]." *Ibid.* The court of appeals held that the district judge's recusal was warranted under the circumstances, because "[n]o reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his

unreasonable fury toward the prosecutors." *Id.* at 12a. The court explained that in light of this reasoning, it had directed in a supplemental order entered on July 28, 2010, that the case be reassigned pursuant to Rule 25(a)(2) and that the new judge certify familiarity with the trial record before proceeding with the trial. *Id.* at 23a.

8. On remand, the new district judge reviewed the trial record and certified her familiarity with it. 8/2/10 Tr. 1902. Trial then resumed, and the new judge admitted Roberson Seizure 2 and permitted the government to offer testimony from Koop and the scientists who identified petitioner's fingerprints on the tape. On August 4, 2010, the jury found petitioner guilty of conspiring to import and export more than five kilograms of cocaine, in violation of 21 U.S.C. 952, 953, and 963; two counts of importing more than 500 grams of cocaine, in violation of 21 U.S.C. 952 and 18 U.S.C. 2; attempting to import cocaine, in violation of 21 U.S.C. 963 and 18 U.S.C. 2; and four counts of importing more than 100 grams of heroin, in violation of 21 U.S.C. 952 and 18 U.S.C. 2. Petitioner was acquitted on several other counts. Petitioner has not yet been sentenced.

ARGUMENT

Petitioner argues (Pet. 15-25) that this Court's review is required because the court of appeals' direction that a new district judge preside over the conclusion of petitioner's trial, without petitioner's consent, violated his Sixth Amendment right to trial by jury. Petitioner also contends (Pet. 21-30) that the court of appeals' grant of mandamus was an extraordinary departure from the ordinary course of judicial proceedings and an abuse of the writ. Further review is not warranted. The

court of appeals' decision is interlocutory, and it does not conflict with any decision of this Court or any other court of appeals. The decision reflects the court's fact-bound evaluation of extraordinary circumstances that are unlikely to arise in any other case, and petitioner's challenges to the court of appeals' conclusions lack merit.

1. Because the court of appeals remanded this case for continuation of petitioner's trial after granting the writ of mandamus, the court of appeals' decision is interlocutory. That posture "alone furnishe[s] sufficient ground for the denial of" the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). Following the district court's final disposition of this case, petitioner will be able to raise his challenges to the substitution of the district judge and the court of appeals' grant of mandamus, together with any other claims that may have arisen out of his conviction and sentencing, in a single petition for certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent * * * judgment[]").

2. Petitioner contends (Pet. 15-25) that "Sixth Amendment due process" prohibits the substitution of a trial judge without the defendant's consent once the trial has begun. Pet. 15-16. Petitioner's argument is without merit, and as petitioner acknowledges, no court has "definitively" considered the question. Pet. 15.

a. As an initial matter, petitioner did not present this argument to the court of appeals in his amended petition for rehearing, and so that court did not address the constitutionality of substituting the trial judge without the defendant's consent in its explanatory opinion denying rehearing. This Court generally does not consider issues raised for the first time on certiorari review. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

b. In any event, neither the Fifth Amendment nor the Sixth Amendment provides defendants with a free-standing right to have the identity of the trial judge remain the same through the course of the trial. The Fifth Amendment's Due Process Clause guarantees defendants a "fair trial before an unbiased judge." *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 910 (2010) (citing *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975)). It does not guarantee that the identity of that unbiased judge must remain constant throughout trial. The Sixth Amendment guarantees the right to trial by an "impartial jury." Although this Court has described this right as including "the superintendence of a judge having power to instruct [the jury] as to the law and advise them in respect of the facts," *Patton* v. *United States*, 281 U.S. 276, 288 (1930), the Court has never suggested that the Sixth Amendment confers a right to have the *same* judge preside over the entire trial, irrespective of the substitute judge's ability to adequately supervise the trial.

Thus, in the absence of a showing that the mid-trial substitution of a judge caused unfair prejudice to the defendant— for instance, a showing that the new judge was biased or the reassignment resulted in specific reasons to question the fairness of the trial or the impartial-

ity of the jury—the substitution implicates no constitutional concerns. See, *e.g.*, *Simons* v. *United States*, 119 F.2d 539, 545 (9th Cir.) (finding no due process violation when the original judge's "successor thoroughly acquainted himself with the facts of the case and read the evidence" and "was in every respect competent to instruct the jury upon the law of the case"), cert. denied, 314 U.S. 616 (1941); *State* v. *Boyd*, 9 P.3d 1273, 1278 (Kan. App. 2000) (stating that "a criminal defendant is not denied any constitutional right when the original trial judge is replaced by another judge who is thoroughly familiar with the record"); *People* v. *Thompson*, 90 N.Y.2d 615, 621 (1997) ("[W]e find nothing in the requirements of due process that indicates that the midtrial substitution of a Judge rises to the level of a per se constitutional violation.").

c. Consistent with these principles, Federal Rule of Criminal Procedure 25(a) permits a new judge to take over a trial in the event of the original judge's "absence, death, sickness, or other disability." The rule helps ensure that a defendant suffers no prejudice from the midtrial substitution of the judge by requiring "the judge completing the trial" to "certif[y] familiarity with the trial record." Fed. R. Crim. P. 25(a)(2). Certification provides assurance that the substitute judge will be able to rule on evidentiary matters, instruct the jury, and perform any other task necessary to supervise the trial. The rule does not, however, require the defendant's consent before the substitution occurs, recognizing that the substitution of a judge who is familiar with the record does not in itself cause the defendant any unfair prejudice.

Petitioner's argument that the substitution of a trial judge without the defendant's consent is a per se viola-

tion of the Sixth Amendment implies that Rule 25(a) is unconstitutional to the extent that it does not require the defendant's consent. See Pet. 18. That argument is without merit. "Rule 25(a) has never been successfully challenged on constitutional grounds." *People* v. *Thompson*, 601 N.Y.S.2d 418, 422 (Sup. Ct. 1993), aff'd, 645 N.Y.S.2d 884 (App. Div. 1996), aff'd, 90 N.Y.2d 615 (1997); see *United States* v. *LaSorsa*, 480 F.2d 522, 531 (2d Cir.) (rejecting argument that substitution under Rule 25(a) was unconstitutional if the defendants did not consent), cert. denied, 414 U.S. 855 (1973); see also *United States* v. *Ortiz*, 603 F.2d 76, 81 (9th Cir. 1979) (upholding Fed. R. Crim. P. 25(b), which permits substitution of a judge after verdict, and rejecting defendant's argument that he could not constitutionally be sentenced by a judge who did not preside over the trial because the new judge was familiar with the record), cert. denied, 444 U.S. 1020 (1980); *United States ex rel. Fields* v. *Fitzpatrick*, 548 F.2d 105 (3d Cir. 1977) (same); *Connelly* v. *United States*, 249 F.2d 576, 580 (8th Cir. 1957) (same), cert. denied, 356 U.S. 921 (1958).

Petitioner relies heavily (Pet. 17-18) on a treatise's suggestion that "[i]n the absence of consent, it would seem that Rule 25(a) cannot be validly applied." 2 Charles Wright & Peter Henning, *Federal Practice and Procedure* § 392 (4th ed. 2009). *Federal Practice and Procedure*, however, bases this statement on a single Second Circuit decision that was issued in 1915—well before Rule 25 was promulgated—and that held that the defendant had a non-waivable right to a single trial judge through the course of the trial. See *Freeman* v. *United States*, 227 F. 732 (1915). *Freeman* does not help petitioner, however, because it was decided on the basis of the now-repudiated premise that the defendant's

right to trial by jury was not waivable, see *Patton*, 281 U.S. at 299, and the court therefore presumed prejudice, see *Freeman*, 227 F. at 759-760. The decision also predated the creation of a procedure in Rule 25(a) for a trial judge to be substituted and for the new judge to certify familiarity with the record. Indeed, the Second Circuit itself has subsequently declined to follow *Freeman* in light of the intervening developments in the law, and it has specifically rejected the argument that petitioner presses here, namely, that "irrespective of whether the defense was prejudiced, an unconsented-to substitution of one judge for another violates the sixth amendment." *LaSorsa*, 480 F.2d at 531 (observing that "the only authority cited by the defendants" was *Freeman* and stating that the court was "not bound by the holding" of *Freeman*). Because *Freeman* has little continuing force in the Second Circuit, that decision lends scant support to a claim that Rule 25(a) is unconstitutional or that the substitution of the judge in this case violated the Sixth Amendment.[2] Nor does *Freeman* create a circuit conflict warranting this Court's review.

The state-court decisions on which petitioner relies (Pet. 18) also do not support his argument. In two of the decisions, the courts held only that, as a matter of state law, mid-trial substitution was impermissible. See *Bailey* v. *State*, 397 N.E.2d 1024, 1027 (Ind. Ct. App. 3d Dist. 1980) (interpreting Indiana's rules of procedure, which did "not purport to apply where the judge be-

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[2] Other decisions have also recognized that *Freeman* has limited force. See, *e.g.*, *Thompson*, 90 N.Y.2d at 619-620; *Commonwealth* v. *Carter*, 669 N.E.2d 203, 205-206 (Mass. 1996) (stating that *Freeman* and similar decisions were "generally entangled with outdated conceptions of the right to trial by jury" as "formalistically * * * requiring a single tribunal comprised of both judge and jury").

comes unavailable before the verdict," and contrasting federal Rule 25(a)); *State* v. *Davis*, 564 S.W.2d 876 (Mo. 1978) ("We decline at this time to adopt a [state] rule of practice comparable to Fed. R. Crim. P. 25(a)."). The third decision, *People* v. *McPherson*, 26 N.Y.S. 236 (N.Y. Sup. Ct. 3d Dep't 1893), has been abrogated by the New York Court of Appeals' holding in *Thompson* that a mid-trial substitution is not a per se constitutional violation. See 90 N.Y.2d at 619 n.3, 621-622 (citing *McPherson*, 26 N.Y.S. at 237).

d. Petitioner contends (Pet. 19-20) that even if the "mid-trial substitution of [a] judge is not unconstitutional *per se*," this Court should consider whether "the substitution of judge prejudiced the [p]etitioner." Petitioner cannot establish that he suffered any prejudice during the continuation of his trial, and this fact-bound question—which the court of appeals necessarily did not have the opportunity to address—does not merit this Court's consideration.

Petitioner first argues (Pet. 20) that he was prejudiced because there was a "very substantial risk that the jury believed that the government was correct" regarding the admissibility of government exhibit Roberson Seizure 2. But that same risk would have existed if the court of appeals had reversed the district court's exclusion of the evidence without reassigning the case. Moreover, the new district judge explicitly instructed the jury that it was not to "speculate about the causes or reasons for the delays" in the case or hold the delays against either party and that it was to "decide the case based only on the evidence." 8/2/10 Tr. 1913. A jury is presumed to follow its instructions. *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987).

Petitioner also argues (Pet. 20-21) that he was prejudiced because his motions for a judgment of acquittal under Fed. R. Crim. P. 29, and for a new trial under Rule 33, were decided by a judge who had not heard the majority of the evidence in the case.[3] But Rule 25(a) is designed to account for that circumstance, by requiring the substituting judge to certify familiarity with the trial record. Fed. R. Crim. P. 25(a)(2). The substituting judge did that here, stating that she had "read the entire trial transcript * * * from beginning to end," "reviewed the docket, the orders entered by Judge Holderman, the opinions from the Court of Appeals, the orders from the Court of Appeals * * * [and] all the photographic exhibits," and was "fully prepared and completely familiar with the record and therefore ready to proceed with the trial." 8/2/10 Tr. 1902. Petitioner does not identify any example of the new judge's unfamiliarity with the record, let alone one that unconstitutionally prejudiced him. Although petitioner suggests (Pet. 19, 21) that prejudice might result if a substitute judge is required to decide credibility issues, petitioner does not identify any aspect of his motions (or any other ruling issued by the substitute judge) that involved credibility issues or that could not have been adjudicated by a judge who was thoroughly familiar with the trial record. Petitioner is entitled to challenge on appeal the district court's denial of his motions, but he has not identified any prejudice arising from the resolution of the motion by a substitute judge who satisfied the requirements of Rule 25.

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[3] As petitioner notes (Pet. 20), his Rule 33 motion had not yet been decided when petitioner filed his petition for a writ of certiorari. The district court has since denied the motion. See 1:01-cr-1098-1 Docket entry No. 844 (Dec. 9, 2010).

3. Petitioner next contends (Pet. i, 21-25) that, in reassigning the case, the court of appeals departed so far from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory power is warranted. See Sup. Ct. R. 10(a). Petitioner is incorrect.

Petitioner argues (Pet. 21) that the court of appeals improperly "relied almost entirely on one litigant's characterization of the judge's conduct." The court of appeals, however, stated that before issuing its explanatory opinion and denying panel rehearing, it reviewed petitioner's motion for rehearing, the district judge's request to file a response to the government's mandamus petition, and the trial transcript. Pet. App. 6a; see *id.* at 9a (quoting trial transcript). The court thus considered the trial record as well as submissions by both petitioner and the district judge.

Petitioner also argues (Pet. 22-23) that the court of appeals should have given the district judge an opportunity to reconsider his rulings. But the court of appeals did exactly that when it denied the government's first mandamus petition on the basis of the district court's assertion that it had not "definitively" excluded the fingerprint evidence (even though the district court had sustained petitioner's objection to the evidence). Nor was the court of appeals required, as petitioner contends, *ibid.*, to first allow the district judge to consider whether to recuse himself. Such a course would have further delayed the trial. Moreover, when recusal concerns are presented in the context of an appeal, appellate courts regularly order reassignment to a new judge without first giving the original judge the opportunity to recuse himself. See, *e.g.*, *United States* v. *Hernandez*, 604 F.3d 48, 55-56 (2d Cir. 2010) (ordering that case be

reassigned on remand where a reasonable observer might question the district judge's impartiality).

In short, the court of appeals acted with restraint, and its opinion reflects a careful review of the record. Petitioner may find the court of appeals' reasoning "unsatisfactory," Pet. 22, but petitioner's disagreement with the decision does not render the court's action an extraordinary departure from "the accepted and usual course of judicial proceedings," Sup. Ct. R. 10(a), that warrants an exercise of this Court's supervisory power. Nor does the court of appeals' fact-bound conclusion, based on its review of the trial record, that the original district judge exhibited "unreasonable fury toward the prosecutors" that would lead a reasonable person to question his objectivity, Pet. App. 12a, merit this Court's review.

4. Finally, petitioner asserts (Pet. 25-30) that the court of appeals' grant of mandamus conflicts with this Court's decision in *Will* v. *United States*, 389 U.S. 90 (1967). Petitioner is incorrect.

In *Will*, the Court held that mandamus "does not run the gauntlet of reversible errors," 389 U.S. at 104 (internal quotation marks and citation omitted), and that the writ may be granted only in "extraordinary" circumstances, *id.* at 107. The Court cautioned that if the writ were routinely granted during the course of criminal proceedings, it might be "employed as a substitute for appeal in derogation" of 18 U.S.C. 3731, which permits the government to take an interlocutory appeal of only certain enumerated district-court rulings. *Will*, 389 U.S. at 97. *Will* did not suggest, however, that a court of appeals may not grant mandamus when it is presented with extraordinary circumstances. Rather, in reversing the court of appeals' grant of mandamus, the

Court emphasized that the record was devoid of findings suggesting that mandamus was justified. See *id.* at 107 ("What might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the Court of Appeals, we cannot and do not say."); see also *United States* v. *Wexler*, 31 F.3d 117, 128 n.16 (3d Cir. 1994) (stating that *Will* "does not preclude the use of mandamus to review an interlocutory order that expresses an erroneous, preliminary jury instruction"), cert. denied, 513 U.S. 1190 (1995).

Courts have accordingly recognized that although mandamus is an "extraordinary remedy," the writ may be granted within the sound discretion of the court of appeals. See *Miller* v. *French*, 530 U.S. 327, 339 (2000); 28 U.S.C. 1651 (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). The writ may be issued, consistent with *Will*, when the district court has committed a clear abuse of discretion and no other remedy would suffice. See *Mallard* v. *United States Dist. Ct. for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989); see also, *e.g.*, *United States* v. *Vinyard*, 539 F.3d 589, 591 (7th Cir. 2008) (mandamus appropriate where district court *sua sponte* vacated defendant's plea); *United States* v. *Amante*, 418 F.3d 220, 222 (2d Cir. 2005) (granting mandamus where district court *sua sponte* bifurcated trial).

Both conditions were satisfied here. As the court of appeals explained, the district court clearly abused its discretion: it inexplicably rejected overwhelming chain-of-custody evidence; disregarded controlling case law establishing that gaps in the chain of custody go to the weight, not the admissibility, of evidence; posited implausible theories about government tampering with

evidence; repeatedly and baselessly accused the government of lying and other misconduct; and threatened to declare a mistrial which would have had a double-jeopardy effect. Pet. App. 4a, 7a-12a. Although petitioner challenges (Pet. 26-28) the court of appeals' characterization of the district court's rulings, that fact-bound issue does not warrant the Court's review.

The government also had no other adequate remedy, because the district judge had excluded highly probative evidence, and double jeopardy would have barred retrial or an appeal had petitioner been acquitted. See Pet. App. 7a; *Wexler*, 31 F.3d at 128-129. Moreover, because the government demonstrated that this case concerned extraordinary circumstances involving a "patently unsound" ruling that would cause irreparable harm, Pet. App. 5a, the court of appeals correctly concluded that the mandamus petition was not an attempted end-run around Section 3731. See *id.* at 7a (rejecting petitioner's argument that mandamus was inappropriate because Section 3731 did not authorize an interlocutory appeal of a mid-trial evidentiary order).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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